

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

**WILLIAM L. SHOULDERS,** )  
Petitioner, )  
v. ) 2:14cv1753  
**J.A. ECKARD, Respondent, THE** ) **Electronic Filing**  
**THE ATTORNEY GENERAL OF THE** ) Judge David Stewart Cercone/  
**STATE OF PENNSYLVANIA,** ) Chief Magistrate Judge Maureen P. Kelly

**MEMORANDUM ORDER**

March 29, 2016

The above-captioned pro se Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus (the “Petition”) was received by the Clerk of Court and was referred to Chief Magistrate Judge Maureen P. Kelly for pretrial proceedings in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Local Civil Rules 72.C and D.

The Respondents filed a Motion to Dismiss, asserting that the Petition is time barred. ECF No. 14. Chief Magistrate Judge Kelly, in the Report and Recommendation, ECF No. 19, filed on February 29, 2016, recommended that the Petition be dismissed as time barred and that Respondents’ Motion to Dismiss be granted. Petitioner filed Objections. ECF No. 20.

Nothing in those Objections merits rejection of the Report, nor extended discussion. Petitioner does not argue that the Petition is not time barred. Nor does he argue that the evidence concerning gunshot residue is “new” but only that the defense was not provided with the evidence of the gun shot residue at the time of trial. ECF No. 20 at 2 – 4. We note that to the extent Petitioner argues a *Brady* violation by the prosecution’s alleged withholding of this evidence, there simply was no such evidence of gunshot residue created. The Commonwealth did not possess such evidence because no gunshot residue testing was done. ECF No. 14-10 at 26 -27. Indeed, Petitioner’s own trial counsel argued that the lack of such testing was a fatal

flaw in the Commonwealth's case in chief. Trial Transcript at 691 -692. If the Commonwealth does not possess evidence, it cannot violate its obligations under *Brady* by failing to produce such non-existent evidence. *Saunders-El v. Rohde*, 778 F.3d 556, 562 (7th Cir. 2015), *reh'g denied* (Feb. 26, 2015) ("*Brady* does not require the creation of exculpatory evidence"); *Goins v. Lewis*, 106 F.3d 407 (9th Cir. 1997) ("*Brady*, however, does not require the prosecution to create exculpatory evidence for the defendant.").

To the extent that Petitioner is arguing that the Commonwealth withheld the clothing of the victim from being tested by a defense expert, the Report correctly concluded, as found by the State Courts, that Petitioner's trial counsel deliberately chose to not have the clothing tested for gunshot residue so that trial counsel could argue the lack of testing redounded to the detriment of the Commonwealth which had the burden of proof and that the Commonwealth's failure to have the clothing tested permitted the jury to find reasonable doubt. *See Report and Recommendation*, ECF No. 19 at 10 n.3.

As for the claim that the opposite trajectory bullet could not have been fired by Petitioner, ECF No. 4 at 8, the evidence of record is to the contrary as Dr. Shaun Ladham, a forensic expert for the Commonwealth explained how Petitioner could indeed have shot that bullet. Trial Transcript, at 414 – 417.

Any Objection not specifically addressed herein was considered but found to not merit any discussion because the Objection did not alter the outcome of the case.

Accordingly, after de novo review of the pleadings and the documents in the case, together with the Report and Recommendation and the Objections thereto, the following order is entered:

AND NOW, this 29th day of March 2016,

IT IS HEREBY ORDERED that the Objections are overruled and that the Motion to Dismiss is **GRANTED** and the Petition is dismissed as time barred.

IT IS FURTHER ORDERED that the Report and Recommendation, ECF No. 19, filed on February 29, 2016, by Chief Magistrate Judge Kelly, is adopted as the opinion of the Court.

A Certificate of Appealability is denied.

s/ DAVID STEWART CERCOME

David Stewart Cercone  
United States District Judge

cc: The Honorable Maureen P. Kelly  
Chief United States Magistrate Judge

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